

February 19, 2004

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

**Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide
Programmatic Agreement Regarding the Section 106 National Historic
Preservation Act Review Process" – WT Docket No. 03-128**

Dear Ms. Dortch:

On Thursday, February 12, 2004, the following individuals, representing the companies or associations indicated, all members of the Drafting Committee of the working group established by the Advisory Council on Historic Preservation ("ACHP") and known as the Telecommunications Working Group ("TWG"), conducted a meeting of the Drafting Committee at which an official of the Commission also participated, to discuss issues relevant to the above-identified proceeding:

John Clark –	Perkins Coie LLP – The Wireless Coalition to Reform Section 106
John Fowler	Advisory Council on Historic Preservation ("ACHP")
Valerie Hauser	ACHP
Jay Keithley	PCIA – The Wireless Infrastructure Association
Betsy Merritt	National Trust for Historic Preservation
Nancy Schamu	National Conference of State Historic Preservation Officers ("NCSHPO")
Roger Sherman	Sprint Corporation
Greg Smith	United South and Eastern Tribes ("USET")
Charlene Vaughn	ACHP
Andrea Williams	Cellular Telecommunications & Internet Association ("CTIA")

The following persons participated in the above-described meeting by means of a telephone link:

Ann Bobeck	National Association of Broadcasters ("NAB")
Sheila Burns	Environmental Resource Management ("EMR")
Bambi Kraus	National Association of Tribal Historic Preservation Officers ("NATHPO")
Jo Reese	Archeological Investigations Northwest, Inc. – American Cultural Resources Association ("ACRA")

The Commission official present for this meeting was as follows:

Frank Stilwell	Wireless Telecommunications Bureau ("WTB")
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In this meeting, the ACHP representatives stated that the purpose of the meeting was to continue the discussion started in the conference call on February 6, 2004 of the "ACHP Proposal for Expediting Identification and Evaluation for Visual Effects" dated January 29, 2004, which was circulated at the TWG meeting on that date.

The group first discussed the use of qualified professional consultants and whether the use of such professionals should be required to determine in the field the applicability of an exclusion contained in the NPA. Industry representatives stated that they often do use such consultants in Section 106 reviews, but that this agreement should not eliminate flexibility on this issue. Several views were expressed about the benefits to the process from the use of qualified professionals.

The group discussed a document entitled "Proposed Amendments to the Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission." (Copy attached as Attachment 1).

The group agreed that one goal of the drafting committee was to eliminate the requirement of surveys for visual effects to properties whose eligibility for the National Register of Historic Places is undetermined. The group also agreed that visual effects would be considered in the case of properties listed and determined eligible for the National Register, and the point of the discussion was to determine what other properties should also be considered. The group agreed that this group of properties should be ascertainable, finite and not open-ended.

The group discussed several methods of categorizing other properties that might be considered for visual effects, with most of the methods based on determinations of eligibility of various kinds. The NCSHPO representative insisted that applicants

should evaluate all properties in the SHPO's inventory of properties and consider visual effects to any that appear to meet the criteria for eligibility. Industry representatives provided to the group a chart taken from the Department of the Interior's website showing that there are over 3.6 million properties on state inventories. (Copy attached as Attachment 2). The NCSHPO representative acknowledged that the quality, size and form of SHPO inventories varied greatly, and that not all properties contained on an inventory would be considered eligible for the national register.

The representative from the National Trust suggested the group consider some form of a program operating in Ohio, where SHPO office charges \$150 to prepare a list of properties in the area of potential effects ("APE") of a project.

The group summarized the points of agreement in this discussion involving visual effects, which included the following: (1) there should be no surveys for visual effects; (2) the use of qualified professionals should be options; (3) limitations that the Drafting Committee agrees should be placed on consideration of visual effects to potentially eligible properties are not intended to apply to, and shall not affect, the method for considering direct effects in the NPA; (4) the universe of eligible properties for which visual effects should be considered should be limited, finite and not open-ended; (5) the concept of "inventory" needs to be clarified; (6) the NPA can neither require nor prohibit fees to SHPOs; (7) research to identify eligible properties should be confined to records readily ascertainable and available in SHPO's offices, not off site.

The National Trust representative strongly urged that the SHPO be allowed identify in the consultation properties in the APE that the SHPO has a good reason to believe is eligible. The group generally agreed that if so, the SHPO should do this within the 30-day review period. The group considered whether properties in the process of nomination to the National Register should be included, and agreed that if so, there should be a required filing or ascertainable step that would trigger this category. The group proposed that properties the subject of a prior Section 106 review where the agency and the SHPO agreed to consider the property eligible (called "consensus DOE" properties), might be considered for visual effects.

The USET representative stated that he was gratified that this proposal did not change the procedures for consideration of physical effects, which are the primary concern for tribes. He also stated that visual effects are more important to tribes in the west than in the east. An ACHP representative stated that her agency would not agree to a provision that required tribes to post properties on lists.

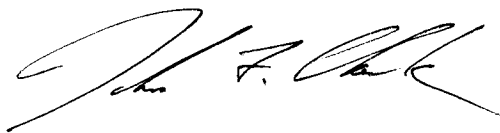
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One ACHP representative stated that it was important that industry have some comfort with the final product because "you do the work."

Acknowledging that this letter does not purport to repeat all of the statements from all participants in this meeting, but only to summarize the main topics of discussion as required in the Commission's rules, this notice is submitted on behalf of the non-FCC parties identified above, except for the ACHP, which the Commission has ruled is exempt from compliance with the Commission's *ex parte* rules in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John F. Clark". The signature is fluid and cursive, with a long horizontal stroke at the end.

John F. Clark

Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

**February 9, 2004
The Wireless Coalition to Reform Section 106**

Proposed Amendments to the

NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF EFFECTS ON HISTORIC PROPERTIES FOR CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL COMMUNICATIONS COMMISSION

**To Allow Consideration of Visual Effects to Certain Designated Properties
and to
Eliminate Consideration of Visual Effects to
Other Properties Only Potentially Eligible for the National Register**

INTRODUCTION AND SUMMARY

The redline-highlighted language in the sections appearing below are proposed amendments to the Nationwide Programmatic Agreement ("NPA") currently under consideration by the Federal Communications Commission ("FCC"). The amendments are designed to be inserted into the identified sections of the NPA for the purpose of eliminating consideration of visual effects to most properties that are only potentially eligible for the National Register of Historic Places ("National Register").

The amendments would allow full consideration and evaluation of all physical effects to all properties, including potentially eligible properties, exactly as is currently required by the NPA. The amendments also allow consideration of visual effects, as appropriate under the current provisions of the NPA, but limited as follows:

1. Visual effects to a property (including a potentially eligible property) from an undertaking may be considered and evaluated whenever that undertaking will be constructed on or within the boundary of, or will

otherwise cause physical alteration or destruction of or damage to, that property.

2. Otherwise, only visual effects to published designated properties (as that term is defined in the amendments) within an undertaking's area of potential effects ("APE") may be considered and evaluated.

Four Types of "Designated Properties". In summary, the proposed amendments define the term "designated property" to include the following four categories of property: (1) a property included in the National Register; (2) a property determined eligible by the Keeper of the National Register; (3) a property that has been previously determined, by both a SHPO and either a federal agency or an Indian tribe or Native Hawaiian organization ("NHO"), to meet the National Register criteria for eligibility or is identified by a SHPO as being in the process of nomination to the National Register; and (4) an eligible property that an Indian tribe or NHO identifies and submits to the FCC's Tower Construction Notification System ("TCNS").

Four Publicly Accessible Lists. Under these amendments, the location of all designated properties (except those requiring confidential treatment) will be readily and publicly identifiable without the need for specialized training or qualifications. Properties in the first two categories described above will be publicly accessible on the familiar lists published by the Keeper. Properties in the third category will be publicly accessible on a list to be created and published by each SHPO, which will be called the SHPO National Register List, or "SNR List." Properties in the fourth category will be publicly accessible on the TCNS.

Limitation on Identification of Properties. Because all of the properties for which visual effects may be considered will be readily and publicly identifiable on one of the four lists described above, the proposed amendments also eliminate requirements of identification of, and consideration of visual effects to, all potentially eligible properties not physically affected, and not appearing on one of the four lists.

PROPOSED AMENDMENTS

The following are the proposed amendments, identified by the specific section of the NPA into which they would be inserted, and shown here in redline. The main operative sections implementing the limitation on consideration and identification of potentially eligible properties for visual effects would appear in Section VII, as follows:

VII. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

B. Definition of the Area of Potential Effects

...

2 Visual Effects

- a. Visual effects from an Undertaking shall only be considered or evaluated under this Agreement: (1) in the case of potential visual effects to a particular Property or Historic Property, where the Undertaking is located on or within the boundary of, or will otherwise physically alter, damage or destroy, that Property or Historic Property; or (2) in the case of potential visual effects to a Designated Property within the APE of an Undertaking, where the visual effects to that Property meet the criteria for effects to Historic Properties.

...

C. Identification of Historic Properties

...

2. The level of effort and the appropriate nature and extent of identification efforts will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE, and the current nature of and thoroughness of previous research, studies, or Section 106 review. No identification of any Property is required where the only potential effect to that Property is visual.

Definitions. In addition, the following four definitions would be added to Section II:

II. DEFINITIONS

- A. The following terms are used in this Nationwide Agreement as defined below:

- ...
4. **Boundary.** The boundary of the area of historic significance for purposes of determining the eligibility of a Property for the National Register. For a Property included in or determined eligible for the National Register, the boundary is specified in the Property's nomination, either in a verbal boundary description, a metes-and-bounds description, a map, or some other method of specifically delineating its boundary. For other Properties, the boundary is a line surrounding the Property that encompasses, but does not exceed, the full extent of the significant resources and significant land areas that make up the Property and that retain integrity. A boundary for any Property should be large enough to include all historic features of that Property, but should not include buffer zones or areas not directly contributing to that significance, or peripheral areas of the Property that no longer retain integrity.
- ...

10. **Designated Property.** For purposes of this Agreement, a Designated Property is any of the following:
 - a. A Historic Property included on the National Register and appearing on the current list of such properties published in the Federal Register;
 - b. A Historic Property determined by the Keeper of the National Register to be eligible for inclusion on the National Register and appearing on the current list of such properties published in the Federal Register;
 - c. A Property appearing on a current SNR List; and
 - d. Any Property of religious and cultural significance to an Indian tribe or NHO and appearing on either an SNR List or a list of such Properties published on the FCC's Tower Construction Notification System ("TCNS"). A SHPO shall add to its SNR List, and the FCC shall post on the TCNS, any Property that meets the National Register criteria for eligibility for which an Indian tribe or NHO submits a request for listing. The FCC and the SHPO will accord confidential treatment to any Property listing when

appropriate under the provisions of Section 800.11(c) of the Council's rules (36 C.F.R. § 800.11(c)).

12. SNR List or SHPO National Register List . A list created and maintained by a SHPO containing the names and identifying information of Properties in its state that have been previously determined, by both the SHPO and either a federal agency or an Indian tribe or NHO, to meet the National Register criteria for eligibility, or that the SHPO identifies as being in the process of nomination to the National Register. The SNR List shall contain each Property's name, its description as either a district, site, building, structure or object, its specific address or location description (or a notice of confidential treatment of this information as provided in Section 800.11(c) of the Council's rules (36 C.F.R. § 800.11(c)), and the date of initial listing.

The SHPO shall publish and regularly update the SNR List on the Internet. Any property that is not either included in the National Register or determined by the Keeper to be eligible for inclusion within three years of the date of initial listing shall thereafter not be considered to be on the SNR List for purposes of this Agreement.

13. Property. A district, site, building, structure or object that appears to meet the criteria of eligibility for listing in the National Register.

State Historic Inventory Automation

States	ARCHEOLOGICAL SITES			HISTORIC PROPERTIES			SURVEY REPORTS		
	SHPO Inventory	No. in Database(1)	No. Digitized(2)	SHPO Inventory	No. in Database	No. Digitized	SHPO Inventory	No. in Database	No. Digitized
Alabama	19,758	197.58	0.00	40,000	0.00	0.00	100	0.00	0.00
Alaska	16,827	143.03	0.00	6,931	38.12	0.00	7,163	57.30	0.00
Arizona	100,000	800.00	600.00	39,000	179.40	128.70	16,000	40.00	40.00
Arkansas	34,190	341.90	341.90	28,000	210.00	56.00	4,242	42.42	41.57
California	120,000	840.00	240.00	112,000	1,120.00	896.00	110,000	825.00	275.00
Colorado	75,000	712.50	0.00	70,000	665.00	0.00	14,000	133.00	2.80
Connecticut	4,429	44.29	44.29	76,000	760.00	608.00	1,574	15.74	0.79
Delaware	2,500	0.50	2.00	29,000	5.80	2.90	320	3.20	0.00
Dist. of Columbia	5	0.00	0.00	30,000	300.00	0.00	27	0.27	0.00
Florida	22,190	221.90	199.71	100,298	1,002.98	1,002.98	5,437	54.37	54.37
Georgia	28,000	280.00	280.00	68,000	340.00	380.80	2,102	5.26	0.00
Hawaii	15,000	132.00	135.00	7,000	37.10	0.00	5,000	50.00	50.00
Illinois	16,000	160.00	160.00	160,000	0.00	0.00	500	5.00	5.00
Indiana	47,500	427.50	0.00	166,000	166.00	0.00	22,700	0.00	0.00
Iowa	18,737	178.00	0.00	100,000	50.00	0.00	7,500	45.00	0.00
Kansas	11,000	110.00	110.00	38,000	380.00	0.00	2,640	25.87	26.40
Kentucky	20,000	200.00	80.00	38,450	380.66	0.00	6,270	62.07	3.14
Louisiana	14,193	141.93	93.67	30,000	0.00	0.00	2,162	21.19	0.00
Maine	7,688	76.88	5.38	20,000	124.00	0.00	685	6.44	0.62
Maryland	10,000	90.00	95.00	35,000	290.50	199.50	1,500	15.00	15.00
Massachusetts	8,000	76.00	0.00	250,000	1,300.00	550.00	1,656	0.00	0.00
Michigan	19,151	191.51	0.00	312,000	124.80	0.00	1,924	15.01	0.00
Minnesota	10,000	100.00	0.00	39,070	386.79	0.00	3,336	33.36	0.00
Mississippi	16,000	160.00	144.00	28,000	0.00	0.00	5,489	0.00	0.00
Missouri	40,000	40.00	0.00	190,000	570.00	0.00	5,360	0.00	0.00
Montana	0	0.00	0.00	34,000	340.00	0.00	19,500	195.00	0.00
Nebraska	6,100	61.00	30.50	50,000	350.00	0.00	7,000	70.00	0.00
Nevada	50,000	250.00	5.00	6,000	18.00	0.00	15,100	75.50	1.51
New Hampshire	1,800	0.00	0.00	10,000	0.00	0.00	660	0.00	0.00
New Mexico	120,000	1,200.00	1,200.00	1,500	15.00	0.00	58,277	576.94	58.28
North Carolina	31,910	165.93	0.00	100,000	300.00	0.06	4,669	6.07	3.27
New Jersey	5,000	0.00	0.00	150,000	150.00	0.15	3,200	4.80	0.00
New York	11,000	110.00	88.00	175,000	1,750.00	3.50	4,050	0.00	0.00

(1) Historic properties database

(2) Geographic Information System (GIS) Survey Reports database

State Historic Inventory Automation

	ARCHEOLOGICAL SITES			HISTORIC PROPERTIES			SURVEY REPORTS		
States	SHPO Inventory	No. in Database(1)	No. Digitized(2)	SHPO Inventory	No. in Database	No. Digitized	SHPO Inventory	No. in Database	No. Digitized
North Dakota	25,000	200.00	0.00	15,000	150.00	0.00	7,000	70.00	0.00
Ohio	35,000	210.00	0.00	100,000	1,000.00	0.00	5,300	0.00	0.00
Oklahoma	16,000	160.00	0.00	10,000	10.00	0.00	8,240	81.58	0.00
Oregon	32,000	9.60	0.00	28,000	268.80	0.00	17,023	170.23	0.00
Pennsylvania	17,800	174.44	172.66	105,000	1,050.00	8.93	2,900	26.10	27.55
Puerto Rico	1,000	8.00	0.00	1,156	11.56	0.00	41	0.00	0.00
Rhode Island	2,157	21.57	6.47	14,000	140.00	1.33	502	4.67	0.50
South Carolina	21,000	210.00	210.00	40,000	200.00	1.16	6,300	3.15	3.15
South Dakota	12,000	120.00	0.00	1,800	16.20	0.00	5,500	55.00	0.00
Tennessee	16,500	165.00	160.05	140,000	980.00	4.90	7,000	39.90	0.00
Texas	60,000	600.00	600.00	152,000	1,520.00	8.51	10,700	107.00	107.00
Utah	65,000	396.50	455.00	83,750	837.50	0.00	24,140	238.99	0.00
Vermont	4,000	20.00	6.00	60,000	60.00	0.03	180	0.00	0.00
Virgin Islands	750	0.00	0.00	2,000	0.00	0.00	750	0.00	0.00
Virginia	30,000	300.00	300.00	100,000	210.00	0.63	3,642	0.00	0.00
Washington	20,000	194.00	170.00	45,000	0.00	0.00	9,700	48.50	0.00
West Virginia	8,100	1,620.00	7,290.00	30,000	3,000.00	1,500.00	560	560.00	504.00
Wisconsin	28,297	282.97	0.00	130,000	1,040.00	0.00	5,909	59.09	0.00
Wyoming	42,750	427.50	4.28	14,250	142.50	0.00	35,000	263	3.50
TOTAL	1,339,332	12,572.03	13,228.91	3,611,205	21,990.71	5,354.08	490,530	4,110.51	1,223.44

(1) Historic properties database

(2) Geographic Information System (GIS) Survey Reports database